Filed 1/11/10 In re Justin K. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re JUSTIN K. et al., Persons Coming Under the Juvenile Court Law.	B213553 (Los Angeles County Super. Ct. No. CK75293)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RICHARD K., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Terry T. Truong, Judge. Affirmed.

Helen H. Yee, under appointment by the Court of Appeal, for Defendant and Appellant.

James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

I.

INTRODUCTION

Richard K. (hereinafter Father) appeals from the jurisdiction and disposition order of the dependency court declaring his two children dependents under Welfare and Institutions Code section 300.[1] Father contends: (1) he was provided inadequate notice of the January 16, 2009, jurisdiction and disposition hearing; (2) there was no substantial evidence supporting the court's order asserting jurisdiction over his children; and (3) the record lacked substantial evidence to support the dependency court's finding that there were no reasonable means to protect the children without removal from Father's custody. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The initial facts.*

Justin K., born in 2007, is the son of M.K. (Mother) and Father. In late November 2008, Mother gave birth to Jean, who was also Father's son. Upon Jean's birth, respondent, the Department of Children and Family Service (DCFS or the Department), was notified that Mother had tested positive for methamphetamine. Jean did not test positive for drugs. In an interview with a social worker at the hospital, Mother stated she had experimented with drugs, but she did not consider herself an addict. Father told a social worker that he had gotten his life together, no longer used drugs, and was willing to submit to drug tests. The social worker gave Father a test-on-demand referral for that day, but Father stated he could not drug test until the next day.[2]

The social worker discovered that the family had a prior referral in 2007 that had been closed as unfounded. The children were released to their paternal grandparents.

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[1] Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

[2] Mother is not a party to this appeal. Thus, many facts relating to her have been omitted from this opinion.

On November 13, 2008, DCFS filed a section 300 petition on behalf of both children. As subsequently amended, paragraph B-1 of the petition alleged that Mother had a history of illicit drug abuse and was a current abuser of methamphetamine, rendering her incapable of caring for the children, Mother tested positive for methamphetamine on the day Jean was born, Father failed to take any action to protect the children when he should have known of Mother's illicit drug use, and Mother's drug use and Father's failure to protect endangered the children and placed them at risk of physical and emotional harm.

B. *The detention hearing.*

Father appeared with counsel at a November 13, 2008 detention hearing. Father's counsel stated Father had used drugs in the past but had not used drugs in approximately three years and Father had participated in a drug program. Father's counsel indicated Father was willing to randomly drug test and explained to Father that a missed test was a "dirty" test. Father informed the court that he had completed a parenting class.

The dependency court detained the children. The court ordered monitored visitation and weekly testing for Father. The court also ordered the children detained in the home of their paternal grandparents and the Department was directed to provide Father with no or low cost referrals for weekly drug testing and parenting education and monitored visitation. Father was ordered to return on December 15, 2008 for a pretrial resolution conference (PRC). The court ordered that Jean was to be referred to a regional center.

C. *The PRC and jurisdictional hearing.*

On November 24, 2008, the social worker personally served Father with a notice of hearing on petition for the December 15, 2008 hearing. The notice attached a copy of the petition.

In a December 15, 2008 report, the social worker stated that she had interviewed Father regarding Mother's drug use. Father denied using drugs, denied knowing Mother used illicit drugs, and said he was "not guilty of anything." The social worker also interviewed the paternal grandfather who stated that Mother and Father had lived in his

home for approximately two years, but they had moved out approximately five months prior to the interview. During the time the parents lived with the paternal grandparents, the grandfather did not suspect Mother was using drugs. Also, during that time, only Father had been employed and Mother relied upon the grandparents to care for Justin. The paternal grandmother said she had been taking care of Justin since birth. The social worker could not interview Mother because Mother's whereabouts were unknown. During the time of the investigation, Mother had not visited the children, but Father had visited with them at the paternal grandparents' home.

The social worker concluded that Father, as a former drug user, had enough experience to recognize that Mother was abusing drugs while pregnant and Father should have taken steps to protect the unborn child. The social worker reported that Father continued to be hesitant toward contact with DCFS and on November 24, 2008, Father had refused to sign an acknowledgement that he had received a referral to random drug testing. Father had not submitted to a November 25, 2008, drug test.

Father and his counsel appeared at the December 15, 2008 PRC. Father's counsel explained to the court that Father had not drug tested on November 25, 2008, because Father understood he only had to comply with random drug testing for one month, not drug and alcohol testing for six months. The court reiterated its prior order that Father was to submit to testing and informed Father that there was no time limit for testing. The court informed Father that he needed to attend the mediation set for January 16, 2009. The dependency court further informed Father that if he failed to appear on January 16, 2009, the court could and would proceed on his children's case.

D. *The mediation and disposition hearing.*

On December 16, 2008, the social worker wrote Father to remind him that he was required to random drug and alcohol test. Also, by this time, Father had not started parenting or other programs.

On December 19, 2008, the social worker filed an ex parte application requesting the dependency court order Father to sign documents that would enable Jean be assessed by the regional center and an order directing Father to submit to drug and alcohol testing

and parenting education classes. The social worker reported providing Father with all of the necessary documentation to have Jean referred to the Regional Center, upon Father's promise that he would sign the documents and send them back to the social worker. However, Father had not done so. Thereafter, Father told the social worker that he would not sign the documents, which he had not read.

Father did not appear for the January 16, 2009, jurisdiction and disposition hearing. Father's counsel informed the court that she had not heard from Father. The social worker reported that Father had an extensive criminal history, including a burglary conviction, driving with a suspended license, driving without a license, domestic violence, and fight/offensive words. The social worker also reported that Father had not drug tested on December 12, 17, 30, 2008, and January 6, 2009. Father had not started parenting classes. The dependency court noted that Father had been ordered to appear, indicated it would not continue the matter, and proceeded to adjudication. The court entered into evidence a number of reports, and sustained the allegations in count B-1 in the petition, as amended. The court declared both children dependents of the court, found by clear and convincing evidence that substantial danger existed to the children, there was no reasonable means to protect them without removal from the parents' physical custody, and ordered reunification services and monitored visitation for Father. Father was ordered to random drug test and attend parenting education. A six month review was set for July 17, 2009.

Father appealed from the January 16, 2009 jurisdiction and disposition order. We affirm.

III.

DISCUSSION

A. *Father was provided adequate notice.*

Father contends he did not receive adequate notice of the December 15, 2008 and January 16, 2009 hearings. This contention, premised upon *In re Wilford J.* (2005) 131 Cal.App.4th 742 (*Wilford*), is not persuasive.

Here, on November 24, 2008, the social worker personally served Father with notice of the December 15, 2008 hearing. The notice contained Father's name and address, each section and subdivision of the Welfare and Institutions Code under which the proceeding had been initiated, the date and time and place of the hearing, and the names of the children.

In *Wilford*, Division Seven of this District examined section 291 and held that a notice of a hearing was inadequate. In *Wilford*, the Department had notified a father that a PRC would be held. The father did not appear for the proceeding and the dependency court immediately proceeded to adjudicate the case. (*Wilford, supra,* 131 Cal.App.4th at pp. 746-747.) *Wilford* noted that "[o]nce the jurisdictional hearing has been set, notice must be given to the appropriate parties (§ 291, subd. (a)) and must include, among other things, the date, time and place of the proceeding and a statement of the 'nature of the hearing.' (§ 291, subd. (d)(1)-(5).)" (*Wilford, supra,* at p. 749.)[3] *Wilford* held that the

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[3] Section 291 reads in part:

"After the initial petition hearing, the clerk of the court shall cause the notice to be served in the following manner:

"(a) Notice of the hearing shall be given to the following persons:

"(1) The mother.

"(2) The father or fathers, presumed and alleged.

"(3) The legal guardian or guardians.

"(4) The child, if the child is 10 years of age or older.

". . .

"(6) Each attorney of record unless counsel of record is present in court when the hearing is scheduled, then no further notice need be given. . . .

". . .

"(d) The notice shall include all of the following:

"(1) The name and address of the person notified.

"(2) The nature of the hearing.

"(3) Each section and subdivision under which the proceeding has been initiated.

"(4) The date, time, and place of the hearing.

"(5) The name of the child upon whose behalf the petition has been brought.

"(6) A statement that:

"(A) If they fail to appear, the court may proceed without them.

"(B) The child, parent, . . . is entitled to have an attorney present at the hearing.

juvenile court could not convert a noticed pretrial conference into a jurisdictional hearing without providing proper notice. *Wilford* further held that the generic form of the notice had not notified the father of the nature of the hearing as required by section 291, subdivision (d). (*Wilford, supra*, at pp. 746-747, 750-751.)[4]

The warning language contained in the notice of petition in *Wilford* is identical to the one before us, except in two significant ways. Both notices indicated that the parents (the father in *Wilford* and Father in the present case) had the right to be present and present evidence, had the right to be represented by an attorney, and the dependency court would proceed with the hearing if the parent was not present. (*Wilford, supra*, 131 Cal.App.4th at p. 748.) However, the notice in the present case additionally notified Father in paragraph eight that "[a]t the hearing on the petition, the court may receive evidence and determine whether the allegations are true. If any of the allegations are found true, the court may proceed to disposition, declare the child(ren) to be a dependent child(ren) of the juvenile court, remove custody from the parents or guardians, and make orders regarding placement, visitation and services." Also, unlike *Wilford*, the notice of a petition served on Father was accompanied by a copy of the petition. Further, unlike *Wilford*, here, on December 15, 2008, the dependency court ordered Father to return to the court on January 16, 2009, and warned Father that the case would proceed in his absence, thereby warning Father of the consequences if he failed to subsequently appear.

Thus, Father was specifically informed that at the upcoming hearing, the dependency court would be adjudicating if the allegations in the petition were true, and if so, the court could proceed to disposition and declare the minors a dependent child and remove them from his custody, as had been alleged in the petition. Even though the

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"(C) If the parent . . . is indigent and cannot afford an attorney, and desires to be represented by an attorney . . . .

". . .

"(7) A copy of the petition."

[4] *Wilford* also held that the father forfeited his right to challenge the jurisdictional order because he had appeared at a subsequent disposition hearing and did not challenge the earlier finding. (*Wilford, supra*, 131 Cal.App.4th at p. 754.)

notice did not use the terminology "jurisdiction hearing" or "disposition hearing," Father was notified as to what was expected to occur at the hearing. Further, the petition was attached, notifying Father of the allegations upon which the deprivation of custody could be based. Thus, unlike the father in *Wilford*, Father was provided with a description of the nature of the proceedings and provided with adequate notice.

Father states that the notice in *Wilford* must have contained the language in paragraph eight delineated above because, like the form used in the present case, it was on a standardized form. Father makes this assertion by assuming that the content of the two forms were the same and that the court in *Wilford* simply did not discuss the language contained in paragraph eight. However, this argument is based upon speculation and thus is not persuasive.

Even if we assume the notice to Father was defective, the error does not require reversal. Father had already appeared and the court had already acquired personal jurisdiction over him. Thus, with regard to further proceedings, "[u]nless there is no attempt to serve notice on a parent, in which case the error has been held to be reversible per se [citations], errors in notice do not automatically require reversal but are subject to the harmless beyond a reasonable doubt standard of prejudice. [Citations.]" (*In re J.H.* (2007) 158 Cal.App.4th 174, 183; *In re James F.* (2008) 42 Cal.4th 901, 918.) Father argues he was prejudiced because he was deprived of the right to confront and cross-examine the social worker. However, Father was represented by counsel at the January 16, 2009, hearing who could have cross-examined the social worker. Thus, Father has not shown the requisite prejudice to warrant reversal.

B. *There was substantial evidence to assert jurisdiction over Father's two children.*

Father unpersuasively argues that the record lacked substantial evidence to assert jurisdiction over his two children pursuant to section 300, subdivision (b).

We review jurisdictional findings for substantial evidence. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1319; *In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734.)

Section 300, subdivision (b) requires the court to find that the evidence shows the child is at risk of "serious physical harm or illness . . . ."

We examine the totality of the evidence to determine if the children are at substantial future risk of harm. Either prior harm or substantial future risk of harm can be grounds for dependency jurisdiction. (*In re J.K.* (2009) 174 Cal.App.4th 1426-1434 [distinguishing *In re Rocco M.* (1991) 1 Cal.App.4th 814].) "[A] jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring [the child] within one of the statutory definitions of a dependent. [Citations.]" (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397; accord, *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.)

Here, the fact that Mother tested positive for methamphetamine after giving birth to Jean established that the court could assert jurisdiction over the children as Mother's drug use posed a danger to them. This fact alone established that the dependency court could assert jurisdiction over the children. Additionally, given that Father lived with Mother and Father had been a prior drug abuser, Father should have known that Mother continued to use drugs despite her pregnancy. These facts demonstrated that Father failed to protect both children from Mother's drug use. Also, Father failed to cooperate with the Department, failed to sign required documents, and never drug tested, all suggesting Father lacked a commitment to comply with court orders and suggesting Father posed a risk to the children in the future.

Thus, there was substantial evidence to support the dependency court's findings that the children had been placed at risk of harm and were at risk of harm in the future and the assertion of jurisdiction.

C. *There was substantial evidence to support the dependency court's removal order.*

Father argues the record does not contain substantial evidence to support the order removing the two children from his physical custody. This argument is not persuasive.

Section 358 requires the dependency court to determine the appropriate disposition for the child as determined by what is in the child's best interest. Section 361,

subdivision (c)(1) does not permit the removal of a child from a parent's custody unless "[t]here is . . . substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor [or would be] if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody."

Father contends the children could have been safely returned to his care without removal. However, Father had not been cooperative with DCFS, had not signed documents to enable Jean to be referred to the Regional Center, and had not drug and alcohol tested. Thus, Father had not cooperated with the Department and had not abided by the dependency court's orders, all signifying that he was not responsible and in order to protect the children, they have to be removed from his custody.

IV.

DISPOSITION

The order of the dependency court is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.